

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODNEY W. MARTEL)	
Claimant)	
VS.)	
)	Docket Nos. 227,477 & 222,516
WASTE MANAGEMENT OF WICHITA)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated October 14, 1997, wherein the Administrative Law Judge granted claimant medical treatment with Dr. Chris Miller and temporary total disability compensation if taken off work by the authorized doctor.

ISSUES

- (1) Whether the appeal filed by respondent was timely pursuant to K.S.A. 44-551.
- (2) Whether claimant suffered accidental injury arising out of and in the course of his employment on the date alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board makes the following findings of fact and conclusions of law:

Administrative Law Judge Nelsonna Potts Barnes issued an Order in Docket No. 227,477 on October 14, 1997. Respondent mistakenly appealed Docket No. 222,516 and filed said appeal on October 22, 1997. The Administrative Law Judge has issued no opinion in this docket number and as such respondent's appeal is premature and is dismissed by the Appeals Board.

Respondent filed an appeal in Docket No. 227,477 on October 29, 1997. Claimant contends, pursuant to K.S.A. 44-551, as amended, respondent failed to file its appeal within ten days as required. If the time limitations set forth in K.S.A. 44-551 were computed pursuant to Kansas Administrative Regulation 51-17-1 claimant would be correct. However, the Kansas Court of Appeals in McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996) applied the calculations used in K.S.A. 60-206 which excludes weekends and holidays in computing the ten-day limitations in Workers Compensation matters. K.A.R. 51-17-1 was not cited in McIntyre. In addition, the McIntyre calculation method was adopted by the Kansas Legislature in H.B. 2011, effective July 1, 1997. See K.S.A. 44-551(b)(1), as amended. K.S.A. 44-551, as amended, allows ten days after the effective date of the award when computing the time limitations set forth therein. K.S.A. 44-525(a) states in part:

"The award of the administrative law judge shall be effective the day following the date noted in the award."

As this Order is dated October 14, 1997, the effective date would then be October 15, 1997, with the ten-day limitation to begin October 16, 1997. The Appeals Board finds pursuant to McIntyre that October 29, 1997, is the tenth day following the issuance of the October 14, 1997, Order by Administrative Law Judge Nelsonna Potts Barnes and the appeal by respondent is timely.

With regard to whether claimant suffered accidental injury arising out of and in the course of his employment the Appeals Board finds the Order of the Administrative Law Judge should be affirmed.

Claimant drove a truck for Waste Management of Wichita, a sanitation company. Part of claimant's duties were to hook large trash dumpsters to the back of the Waste Management truck and dump them into the truck. When performing this procedure claimant was required to back the Waste truck up to the dumpster, hook the two together, and operate certain controls in order to hoist the trash dumpster onto the truck. This obligated claimant to turn both to the right and to the left looking through the truck's side view mirrors, and also to look through the back window glass of the truck in order to insure that the guide rails were correctly aligned with the dumpster. Failure to correctly align the dumpster could cause it to roll off, resulting in potential damage to the equipment. The constant turning of claimant's upper body, including his neck, while checking on the hoist was a requirement of this particular job.

While performing this function and turning his head quickly to the right, claimant felt a pop in his neck and a severe burning sensation all the way through his neck and into his shoulders. Shortly thereafter claimant began experiencing severe back spasms and was forced to call his supervisor. He was then transferred by ambulance to the emergency room of the local hospital. Claimant was diagnosed with a cervical strain and referred to his doctor. Claimant contacted respondent requesting a referral to a doctor but was told respondent wasn't sure if they wanted to send him to their doctor or if they wanted him to continue with the doctor he was already seeing for his preexisting shoulder problems. Claimant had prior workers compensation claims filed regarding his shoulders and was undergoing treatment with Dr. Miller, Dr. Troy Trimble, and Dr. Mike Munhall. He had been referred to Dr. Munhall for the neck injury prior to the preliminary hearing and was recommended to undergo therapy.

Respondent cites numerous cases in support of its position that claimant has suffered no accidental injury arising out of and in the course of his employment but has instead experienced an injury associated with a risk personal to claimant. One of the cases relied upon by respondent is Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). In Martin claimant was injured while exiting his truck. The court found the injury to claimant's back to be a "personal risk" which did not arise out of the work place but was instead a risk common to the public at large and thus not compensable.

In this instance the physical gyrations required by claimant's job make the scenario different than that found in Martin. Here claimant is obligated to sit in a large truck cab, operate hand controls with his right hand while turning both to the right and left and also periodically turning to look out of the back of the truck in order to view the ongoing procedure. The twisting required in this job is more severe and more extreme than that which would be required in normal daily living. While a person driving a car may be required periodically to look behind them, there would be no requirement that that person keep their hand on a gear lever or hoist control which would cause strain to the upper body and neck, more severe than that encountered during normal driving. Therefore, the Appeals Board finds that the Order of Administrative Law Judge Nelsonna Potts Barnes granting claimant medical treatment with Dr. Chris Miller for the neck injury should be affirmed.

However, as claimant does have preexisting shoulder injuries and has recently undergone shoulder surgery, it will be necessary that the medical treatment and any temporary total disability awarded for the neck injury be separated from that for the shoulders, as claimant's shoulder injuries do constitute a separate Workers Compensation claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 14, 1997, in Docket No. 227,477 should be, and is hereby, affirmed in all respects and the appeal filed by respondent in Docket No. 222,516 should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Gregory D. Worth, Lenexa, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director